

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)

Implementation of Section 9)
 of the Communications Act)

Assessment and Collection of)
 Regulatory Fees for the 1994)
 Fiscal Year)

MM Docket No. 94-19

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCAI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its reply to the initial comments submitted in response to the *Notice of Proposed Rulemaking* ("NPRM") commencing this proceeding. Specifically, WCAI is submitting these comments to briefly respond to joint comments submitted on behalf of Blade Communications, Inc. and other cable television system operators (collectively, the "Joint Commenters") regarding the regulatory fees to be imposed on Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees.

As the trade association of the wireless cable industry, WCAI's members include not only the operators of virtually every wireless cable system operating in the United States, but also the licensees of MDS and ITFS stations that are used by wireless cable operators to distribute multichannel video programming services to subscribers. Thus, WCAI is vitally interested in the regulatory fees to be paid by MDS and ITFS licensees.

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The thrust of the Joint Commenters is that the licensees of facilities used to provide wireless cable should be, but are not, subject to regulatory fees. However, the Joint Commenters are simply incorrect in their assertion that "MMDS is not expressly addressed in either the statute or the *NPRM*."¹ The MDS is a Domestic Public Fixed Radio Service regulated under subpart K of Part 21 of the Commission's Rules.² Both the Omnibus Budget Reconciliation Act (the "Budget Act") and the *NPRM* specifically provide for regulatory fees to be paid by licensees in the Domestic Public Fixed Radio Services.³ Therefore, the Joint Commenters are incorrect; MDS licensees will be required to pay regulatory fees.

While recognizing that ITFS licensees are not subject to regulatory fees under either the Budget Act or the *NPRM*, the Joint Commenters would have the Commission impose regulatory fees upon those ITFS licensees that permit their facilities to be used for commercial purposes. WCAI believes that such an approach would be inconsistent with Congressional intent.

As is noted in the *NPRM*:

We also note that there is no specified fee category for the [ITFS]. As discussed below, we believe that Congress intended that regulatory fees

¹See Comments of Blade Communications, Inc., Cablevision Industries Corp., Crown Media, Inc., Multivision Cable TV Corp., Paracable, Inc., Providence Journal Company, Sammons Communications, Inc., Star Cable Associates, MM Docket No. 94-19, at 8 (filed April 7, 1994).

²See 47 C.F.R. § 21.900 *et seq.* (1993).

³See *NPRM*, at Appendix A.

would not be applied to this "noncommercial" service. Therefore, ITFS licensees will be exempt from regulatory fees.⁴

WCAI agrees that Congress did not intend for regulatory fees to be imposed on ITFS licensees, and submits that even those ITFS licensees that lease excess capacity should be excluded from the regulatory fee program.

In passing the Budget Act, Congress was well-aware that excess capacity on many ITFS stations is used for the transmission of commercial programming. Indeed, in explaining its decision to exclude ITFS licensees from the provisions of the Budget Act establishing a system of competitive bidding to select from among mutually-exclusive applicants, the Conference Report accompanying the Budget Act specifically states that:

The Conferees note that the principal use of licenses in the Instructional Television Fixed Service is the provision of educational television programming services to public school systems, parochial schools and other educational institutions. The fact that the Commission's rules permit licensees in this service to allow MMDS operators to utilize these frequencies when they are not needed for their principal use will not alter the manner by which these licenses will be issued as the result of the enactment of this legislation.⁵

The same logic should apply with respect to the provision of the Budget Act establishing a regulatory fee program. Congress has not imposed a regulatory fee on any facility that is primarily non-commercial in nature, but which can be used to provide an ancillary commercial service. An ITFS facility must be primarily used for educational or instructional purposes, rendering an exemption from the regulatory fee program

⁴*NPRM*, at 10 n.25.


⁵Conference Report, at 481-482.

appropriate. Just as Congress has exempted ITFS applicants from the competitive bidding system, regardless of whether they propose to lease, so too must it be presumed that Congress intended to exempt ITFS licensees that lease excess capacity from the regulatory fee system.

In short, the *NPRM* properly reflects Congress' intentions with respect to the imposition on facilities used to provide wireless cable service. MDS facilities are subject to regulatory fees, while ITFS facilities are exempt even if excess capacity is used to transmit commercial programming.

Respectfully submitted,

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April 18, 1994

CERTIFICATE OF SERVICE

I, Candace J. Lamoree, hereby certify that a true copy of the foregoing Reply Comments was served this 18th day of April, 1994, by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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A handwritten signature in black ink, appearing to read 'Candace J. Lamoree', is written over a horizontal line.

Candace J. Lamoree